

The Administrative Law Judge awarded benefits for an 81 percent work disability for bilateral knee injuries. Respondent has stipulated to the compensability of claimant's left knee injury but disputes the alleged right knee injury. Respondent also contends that claimant failed to give timely notice for the alleged right knee injury. If the right knee injury is compensable, respondent argues first that the award should be based upon two separate "scheduled" injuries. If the injury is considered an injury to the body as a whole, the award should be limited to functional impairment only on the basis of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995). If work disability is awarded, respondent argues that the extent of the work disability should be based upon the analysis of Karen Terrill as approved by Dr. Kenneth A. Jansson.

Claimant argues that the Award should be affirmed except that claimant contends he is entitled to 55.57 weeks of temporary total disability for the weeks from July 14, 1994 until claimant was released to return to work by Dr. Jansson on August 7, 1995, instead of the 37 weeks of temporary total disability benefits awarded by the Administrative Law Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments by the parties, the Appeals Board finds and concludes that claimant has suffered a compensable injury to his right knee and did give notice as required. The Board also finds the injury should be treated as a general body disability and claimant should be awarded benefits for a 72 percent permanent partial work disability. The Appeals Board also finds that claimant is entitled to 55.57 weeks temporary total disability benefits.

Respondent admits claimant suffered accidental injury to his left knee on July 6, 1994 but denies injury to claimant's right knee. Claimant testified that on July 6, 1994 he was moving tanks on wheels and when he pulled a tank from under his mixer into the filling area, something popped in his left knee. Respondent acknowledges it received proper notice of the left knee injury. He worked for several more days and, on Monday, July 11, 1994 while filling a batch of paint, his right knee gave out and he fell onto his right side. Claimant acknowledges that he did not immediately notify his supervisor of the right knee injury but testified that he did tell his supervisor, Wayne Yowell, on July 12, 1994. Claimant also testified that Mr. Yowell had advised him that the owner would not want to hear about this right knee injury. The Appeals Board finds claimant's testimony credible and, on that basis, finds that claimant did give notice of the right knee that is required by K.S.A. 44-520.

The Appeals Board also finds that claimant did suffer permanent injury to his right knee. The record is clear that claimant has a preexisting problem with his right knee. However, based upon claimant's testimony and supporting testimony of the treating physician, Dr. Jansson, the Appeals Board finds claimant injured both his right and left knee. This conclusion was also reached by Dr. Blake C. Veenis who acknowledged

claimant's preexisting problem but concluded that claimant had suffered injury in both knees in July 1994.

The Appeals Board also concludes that claimant's injury should be treated as an "unscheduled" general body injury. The testimony of Dr. Jansson supports the treatment of claimant's injuries as a general body injury. He testifies as follows:

"If you ask what is the proximate cause to his knee injury to have his right knee fixed, it's injury to the left knee that caused that to happen, it's not the injury that occurred twenty years earlier when he first hurt the knee, 'cause he's obviously coped with it for twenty years without too much trouble. It's the new injury to the left knee that has caused his cumulative weight bearing status and his cumulative functional status to deteriorate on the right side."

Dr. Veenis was also of the opinion that injury to the left knee caused symptoms in the right knee. In effect, the injury to the right knee is a natural consequence at the left knee and both are compensable as a general body injury. See Chinn v. Gay & Taylor, Inc., 219 Kan. 196, 547 P.2d 751 (1976).

The Appeals Board also concludes that claimant should be entitled to work disability. After claimant was released by his treating physician, he presented himself to return to work for respondent with restrictions from Dr. Jansson and Dr. Veenis. Respondent was unable to return claimant to an accommodated position. At the time of the regular hearing, claimant had placed application for work at different potential employers but he remained unemployed. There is no evidence that claimant rejected an offer of employment within his restrictions. The case is not, in our opinion, a case for application of Foulk.

Permanent partial disability based upon work disability is defined in K.S.A. 44-510e as:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."

Both Ms. Karen Terrill and Mr. Jerry Hardin reviewed claimant's 15-year work history and identified the tasks claimant performed in that 15-year history. Based upon Mr. Hardin's listing of tasks, Dr. Veenis agreed that claimant had lost the ability to perform 62 percent of the tasks. Although the Administrative Law Judge discounted the opinions based upon Ms. Terrill's list of tasks, the Appeals Board finds that they are entitled to some weight.

They are supported by the testimony of Dr. Jansson. Dr. Jansson reviewed Mrs. Terrill's list of tasks. He disagreed with Ms. Terrill in one instance. Ms. Terrill felt claimant could perform the task. Dr. Jansson felt she could not. With this modification, Dr. Jansson concluded claimant had lost the ability to perform 6 of the 22 tasks claimant described. This results in a 27 percent loss of ability to perform tasks. Giving both opinions equal weight, the Appeals Board concludes that claimant has lost the ability to perform 44 percent of the tasks.

The Administrative Law Judge noted the claimant has not been able to find employment. As a result, his wage loss is 100 percent. The wage loss of 100 percent and the task loss of 44 percent averaged together yield a 72 percent work disability. The Appeals Board finds the claimant should be awarded benefits based upon that 72 percent disability.

The Appeals Board agrees with the claimant's assertion that the Award understates the number of weeks of temporary total disability benefits. Specifically the Award finds that the claimant was entitled to temporary total disability benefits from the date he last performed work for the respondent until he was released by Dr. Jansson on August 7, 1995. This is 55.57 weeks. The Award indicates that claimant is entitled to 37 weeks of temporary total disability and it is here corrected to award benefits of 55.57 weeks.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated June 12, 1996, should be, and the same is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jewel M. White, Jr., and against the respondent, Dupaco Paint, Inc., and its insurance carrier, ITT Hartford, for an accidental injury which occurred July 14, 1994 and based upon an average weekly wage of \$330.62 for 55.57 weeks of temporary total disability compensation at the rate of \$220.42 per week or \$12,248.74, followed by 269.59 weeks at the rate of \$220.42 per week or \$59,423.03, for a 72% permanent partial work disability, making a total award of \$71,671.77.

As of March 31, 1997, there is due and owing claimant 55.57 weeks of temporary total disability compensation at the rate of \$220.42 per week or \$12,248.74, followed by 86 weeks of permanent partial disability compensation at the rate of \$220.42 per week in the sum of \$18,956.12 for a total of \$31,204.86, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$40,466.91 is to be paid for 183.59 weeks at the rate of \$220.42 per week, until fully paid or further order of the Director.

The Appeals Board adopts as its own the Orders by the Administrative Law Judge relating to fees and expense.

IT IS SO ORDERED.

Dated this ____ day of March 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David H. Farris, Wichita, KS
Robert G. Martin, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director